

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2551

Cir. Ct. No. 2011CV510

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICHAEL W. COYLE, JACQUELINE R. COYLE AND JON T. COYLE,

PLAINTIFFS-RESPONDENTS,

V.

AMANDA K. COYLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Michael Coyle, Jacqueline Coyle, Jon Coyle, and Amanda Coyle are the children of Hubert Coyle, who died in 2007.¹ After Hubert

¹ For the sake of clarity, because the parties share the same surname, we will refer to Michael, Jacqueline, and Jon as the Siblings, and to Amanda and Hubert by their first names.

died, the Siblings sued Amanda, alleging that she had, between 1996 and 2007, engaged in identified wrongful acts that reduced the value of Hubert's estate, and, thereby, reduced the shares of the estate bequeathed to the Siblings in Hubert's will. After a bench trial and post-trial briefing, the circuit court found Amanda liable for breach of her duties under the power of attorney, exercising undue influence over her father, and conversion and theft under WIS. STAT. § 895.446(1) (2015-16),² and awarded damages to the Siblings.

¶2 Amanda appeals, arguing that: (1) the Siblings' claim for breach of duty under the power of attorney is time-barred; (2) the Siblings' claim for undue influence is time-barred; (3) the Siblings lack standing to bring their claim for conversion and theft; (4) the Siblings' claim for damages under WIS. STAT. § 895.446 is time-barred; and (5) even if the Siblings are entitled to damages on their claim for conversion and theft under § 895.446, any damages arising from pre-2005 disbursements are time-barred. As we explain, we conclude that Amanda has forfeited all of the arguments that she makes on appeal by failing to timely preserve them in the circuit court.³ Therefore, we affirm.

BACKGROUND

¶3 The facts that matter to the resolution of this appeal are the procedural facts, which we set out in relevant detail as follows.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

³ The parties speak in terms of whether Amanda "waived" her defenses and arguments on appeal, but as our supreme court has clarified, the issue properly stated is one of forfeiture rather than waiver. See *State v. Ndina*, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (quoted source omitted)).

¶4 In January 2011, the Siblings filed suit against Amanda. The Siblings alleged that Amanda, among other things, engaged in conversion and theft in violation of WIS. STAT. § 943.20, thereby entitling the Siblings to damages under WIS. STAT. § 895.446; breached her duty as Hubert's power of attorney; and exercised undue influence over Hubert, a susceptible testator, for her own monetary gain.

¶5 In April 2011, Amanda filed an answer denying the allegations in the complaint. Under the heading, "Statute of Limitations," Amanda asserted: "The first and second Causes of Action [claim of conversion and claim under WIS. STAT. § 895.446] are intentional torts, subject to the six year limitations period of Wisconsin Statute §839.35(1) [sic]. Most, if not all, of the allegations against Defendant were made for actions outside the limitations period."

¶6 In August 2011, pursuant to the circuit court's first order setting a schedule for dispositive motions, Amanda filed a motion to dismiss based on the following grounds: (1) Hubert did not intend that his entire estate be probated to make the will directives effective; (2) the jointly held accounts were not abused; (3) the transfer to Hubert's ex-wife was proper; (4) the transfers had no negative effect on the principal; (5) an agent has no duty to potential heirs; (6) the statute pertaining to an agent's performance as a power of attorney, which was in effect during the agency here, did not provide for damages; and (7) Amanda did not convert funds to herself or commit theft, and no facts support the claim of undue influence. After briefing, the court denied the motion in November 2011. The court set a second scheduling order providing that any dispositive motions be filed by July 2012. No additional dispositive motions were filed.

¶7 The case proceeded to a three-day bench trial in April 2013. Before witnesses were called on the first day of trial, Amanda filed a trial brief in which she presented legal authority concerning lack of capacity, the test for undue influence, and the “dead man’s statute.” At the same time, Amanda orally moved to dismiss the Siblings’ claim for an accounting on the ground that the accounting had been made, and to dismiss the Siblings’ claim for breach of duty as a personal representative on the ground that Amanda did not accept appointment as a personal representative. The circuit court reserved ruling on those motions until after trial.

¶8 After trial, the circuit court dismissed the Siblings’ claims for an accounting and for breach of duty as a personal representative, and found in favor of the Siblings on their claims of conversion under WIS. STAT. § 895.446, undue influence, and breach of duty under power of attorney. The court accepted the Siblings’ expert’s calculation of damages and ordered the Siblings to submit a written request specifying damages and attorneys’ fees and costs under WIS. STAT. § 895.446, and addressing whether exemplary damages under that statute are appropriate.⁴ The court stated that Amanda could in response argue whether certain expenses should be excluded from the damages request.

¶9 The Siblings filed their request addressing actual damages, exemplary damages, and fees and costs under WIS. STAT. § 895.446. Amanda responded with a motion to strike the following damages claims: (1) the Siblings’

⁴ Relevant here, WIS. STAT. § 895.446(3) provides that a plaintiff who prevails on a claim for damages due to intentional conduct in violation of WIS. STAT. § 943.20 (theft), as the Siblings did in this case, may recover actual damages, reasonably incurred costs of investigation and litigation, and exemplary damages of not more than three times the amount of actual damages awarded.

claim for actual damages, exemplary damages, and fees and costs under § 895.446 as “barred by the applicable two year statute of limitations;” and (2) any claims for “compensatory damages” arising from pre-2005 disbursements as barred by the six-year statute of limitations that Amanda asserted applies to the Siblings’ claim for conversion, and by the two-year statute of limitations that applies to what Amanda styled as the Siblings’ breach of fiduciary duty claim.⁵ After briefing and a hearing, the circuit court denied Amanda’s motion to strike and awarded the siblings \$430,824 in compensatory damages, \$8,000 in exemplary damages, \$232,846 in attorneys’ fees, and \$26,099.64 in attorneys’ costs. The circuit court entered judgment and Amanda appeals from that judgment.

DISCUSSION

¶10 Amanda argues that: (1) the Siblings’ claim for breach of duty under the power of attorney is time-barred; (2) the Siblings’ claim for undue influence is time-barred; (3) the Siblings lack standing to bring their claim for conversion and theft; (4) the Siblings’ claim for damages under WIS. STAT. § 895.446 is time-barred; and (5) even if the Siblings are entitled to damages on their claim for conversion and theft under § 895.446, any damages arising from pre-2005 disbursements are time-barred. As we explain in more detail below, Amanda has forfeited all of her arguments because, as to each of the arguments as numbered above:

⁵ It appears that Amanda styled the Siblings’ breach of duty under power of attorney claim as a breach of fiduciary duty claim in order to trigger the two-year statute of limitations for intentional torts. We need not address this topic because we conclude that Amanda forfeited her statute of limitations argument directed at the claim that the Siblings made, breach of duty under power of attorney.

- (1)-(3) – Amanda raises for the first time on appeal the issues of timeliness as to the claim for breach of duty under the power of attorney, timeliness as to the claim for undue influence, and standing to bring the claim for conversion and theft;
- (4) – Amanda did not raise the defense based on the two-year statute of limitations that she asserts bars the WIS. STAT. § 895.446 claim in her answer, in any dispositive motion pursuant to the circuit court’s two scheduling orders, in her trial brief, or at trial, but first raised it after the court ruled on liability and accepted the Siblings’ expert’s calculation of damages; and
- (5) – Amanda did not raise the defense based on the six-year statute of limitations that she asserts bars any damages for conversion and theft arising from pre-2005 disbursements in the motion to dismiss that she filed before trial, in any other dispositive motion pursuant to the circuit court’s two scheduling orders, in her trial brief, or at trial, but first raised it after the court ruled on liability and accepted the Siblings’ expert’s calculation of damages.

Arguments (1)-(3) Raised for First Time on Appeal

¶11 “A fundamental appellate precept is that we ‘will not ... blindsides [circuit] courts with reversals based on theories which did not originate in their forum.’” *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (quoting *State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995)). Accordingly, “[a]rguments raised for the first time on appeal are generally deemed forfeited.” *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (quoted source omitted). “The

purpose of the ‘forfeiture’ rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the [issue]; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from ‘sandbagging’ opposing counsel” *Ndina*, 315 Wis. 2d 653, ¶30. The forfeiture rule “is one of administration and does not affect this court’s power to address [an] issue. We make exceptions to the rule in cases where the new issue is a question of law and has been fully briefed by both sides, and the question presented is of sufficient public interest to merit a decision.” *State v. Gaulke*, 177 Wis. 2d 789, 794, 503 N.W.2d 330 (Ct. App. 1993) (citations omitted).

¶12 The Siblings argue that Amanda has forfeited the following three arguments because she has raised them for the first time on appeal: (1) the claim for breach of duty under the power of attorney is time-barred; (2) the claim for undue influence is time-barred; and (3) the Siblings lack standing to bring the claim for conversion and theft. Amanda fails to demonstrate that she has not forfeited these arguments, and she also fails to persuade us that we should address these arguments despite forfeiture.

¶13 Amanda does not point to any statute of limitations argument that she made in the circuit court against the Siblings’ breach of duty under the power of attorney claim. Rather, Amanda points to her argument that the claim for breach of fiduciary duty was barred by the two-year statute of limitations for intentional torts, which as she concedes, she first made in her brief supporting her motion to strike, after the court had ruled on both liability and damages after trial.

Regardless of whether she timely made that argument,⁶ it was directed at a claim that the Siblings had not brought.

¶14 Amanda also does not point to any statute of limitations defense that she made in the circuit court against the Siblings' undue influence claim. Rather, she points to the section of the transcript in which the circuit court, after the parties' closing arguments, asked counsel a series of questions before ruling. In the section cited by Amanda, the court and counsel discussed whether undue influence applies to donative transfers other than a will. Nowhere in that section is the statute of limitations topic mentioned.

¶15 Amanda also does not point to any argument that she made to the circuit court regarding the Siblings' standing to bring the claim for conversion and theft. Rather, she points both to her answer, in which she denied stealing from the Siblings, and to her closing argument, in which she made "four comments about that tort of conversion," but neither the denial nor the comments mentioned standing. Amanda also points to a portion of the post-trial damages hearing, where the court asked Amanda's counsel about the Siblings' standing to bring the conversion claim; counsel responded, "I'm not sure;" and the court told counsel that Amanda was "beyond" the point at which she could object to a conversion

⁶ Amanda also forfeited any statute of limitations defense against the breach of duty under the power of attorney claim because she did not assert such a defense in her answer, in any pretrial motion, or at trial. See WIS. STAT. § 802.06(2)(a)9., (2)(b) (providing that a statute of limitations defense shall be made in a responsive pleading if required, in a motion before pleading, or at trial); *Fond du Lac Skyport, Inc. v. Moraine Airways, Inc.*, 67 Wis. 2d 109, 114-15, 226 N.W.2d 428 (1975) (stating that affirmative defenses "must be pleaded in the answer or otherwise properly presented or are [forfeited]").

claim. The court’s statement appears to confirm that Amanda did not raise her standing argument in circuit court.⁷

¶16 Finally, Amanda fails to demonstrate that any of these three arguments first raised on appeal may be addressed without further factual development, that any is of sufficient public interest to qualify for an exception to the forfeiture rule stated above, or that there is any other sound reason that we should address these issues. To the contrary, we can see only sound reasons not to do so.

Arguments (4)-(5) First Raised After Trial

¶17 The Siblings argue that Amanda forfeited the defense based on the two-year statute of limitations that she asserts bars the WIS. STAT. § 895.446 claim, because she did not raise that defense in her answer, in any dispositive motion pursuant to the circuit court’s two scheduling orders, in her trial brief, or at trial, but first raised it after the court had ruled on liability and accepted the Siblings’ expert’s calculation of damages. *See* WIS. STAT. § 802.06(2)(a)9., (2)(b) (providing that a statute of limitations defense shall be made in a responsive pleading if required, in a motion before pleading, or at trial); ***Fond du Lac Skyport, Inc. v. Moraine Airways, Inc.***, 67 Wis. 2d 109, 114-15, 226 N.W.2d 428 (1975) (stating that affirmative defenses “must be pleaded in the answer or otherwise properly presented or are [forfeited]”).

⁷ Amanda also argues that standing is not an affirmative defense that must be asserted in the answer. We need not address this topic because of our conclusion that Amanda failed to argue lack of standing in the circuit court at any time.

¶18 Similarly, the Siblings argue that Amanda forfeited the defense based on the six-year statute of limitations that she asserts bars any damages for conversion and theft arising from pre-2005 disbursements because she failed to raise it in the motion to dismiss that she filed before trial, in any other dispositive motion pursuant to the circuit court’s two scheduling orders, in her trial brief, or at trial, but first raised it after the court ruled on liability and accepted the Siblings’ expert’s calculation of damages. *See* WIS. STAT. § 802.06(2)(a)9., (2)(b) (providing that a statute of limitations defense shall be made in a responsive pleading if required, in a motion before pleading, or at trial); *Fond du Lac Skyport*, 67 Wis. 2d at 114-15 (stating that affirmative defenses “must be pleaded in the answer or otherwise properly presented or are [forfeited]”).

¶19 Amanda responds only that she raised these defenses in her post-trial brief, but she does not develop any argument, supported by legal authority, that she “properly presented” these statute of limitations defenses by doing so. *See Fond du Lac Skyport*, 67 Wis. 2d at 114-15. That is, Amanda fails to provide us with any legal authority to support the proposition that a circuit court is obligated to address a statute of limitations defense that is presented for the first time after the court has ruled on the merits, and we would be surprised to learn of such authority. Accordingly, we reject her argument as unsupported by legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (“We may decline to review issues inadequately briefed.”).

¶20 Finally, Amanda urges us to address the merits because the circuit court briefly ruled on these statute of limitations issues and Amanda has appealed from “these adverse rulings.” The fact that the circuit court decided to make a ruling is pertinent to the question of whether forfeiture occurred and should be applied here, but is not dispositive. The record here reveals that Amanda plainly

sat on her rights and did not present the court and the other side with a fair opportunity to develop the facts and the law on these issues before the court made its decisions on the merits of the claims.

¶21 “[W]e may affirm on grounds different than those relied on by the [circuit] court.” *Vanstone v. Town of Delafield*, 191 Wis.2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). We have done so, and, accordingly, we decline Amanda’s invitation.

CONCLUSION

¶22 For the reasons stated above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).

